(2)

No. 96-663

In the
Supreme Court of the United States
October Term, 1996

MARVIN KLEHR and MARY KLEHR

Petitioners,

v.

A.O. SMITH CORPORATION and
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a petition for rehearing in the court of appeals was not timely filed within 14 days after the entry of judgment and the petition for writ of certiorari is filed more than 90 days after the entry of judgment below, does this Court lack jurisdiction to consider the petition for writ of certiorari?

2. Where Petitioners simultaneously knew or should have known of the existence and source of their injuries and that their injuries were part of a pattern of racketeering activity thirteen or more years before commencing their civil RICO action, may they nonetheless maintain a cause of action under RICO for qualitatively identical injuries resulting from the same pattern of racketeering activity occurring within the four year limitations period?

RULE 29.6 LISTING

A.O. SMITH CORPORATION

The following companies are nonwholly owned subsidiaries of Respondent A.O. Smith Corporation:

- A.O. Smith Electric Motors, Ltd. (Ireland)
- A.O. Smith Holdings, Ltd. (Ireland)
- Changchun A.O. Smith Golden Ring Automotive Products Co., Ltd. (China)
- Claymore Insurance Co. (Bermuda)
- Harbin A.O. Smith Fiberglass Products Company Limited (HSF) (China)
- Metalsa, S.A. de C.V. (Mexico)
- Motores Electricos de Juarez, S.A. de C.V. (Mexico)
- Motores Electricos de Monterey, S.A. de C.V. (Mexico)
- Nanjing A.O. Smith Water Heater Co., Ltd. (China)
- Productos de Agua, S.A. de C.V. (Mexico)
- Productos Electricos Aplicados, S.A. de C.V. (Mexico)

A.O. Smith Corporation has no parent company.

A.O. SMITH HARVESTORE PRODUCTS, INC.

A.O. Smith Harvestore Products, Inc. has no nonwholly owned subsidiaries.

A.O. Smith Harvestore Products, Inc.'s parent company is respondent A.O. Smith Corporation.

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Respondents A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case. That opinion is reported at 87 F.3d 231 (8th Cir. 1996). (Pet'r App. A-1 - A-17)

JURISDICTION

Judgment was entered in the Eighth Circuit on June 6, 1996. An untimely petition for rehearing was received in the Eighth Circuit on June 21, 1996, more than 14 days after the entry of judgment. On July 29, 1996, the Eighth Circuit issued an Order denying the untimely petition for rehearing.

The instant petition was filed on October 25, 1996, more than 90 days after the entry of judgment in the court of appeals. The period for applying for a writ of certiorari has not been extended by a Justice of this Court. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5.

STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 2101(c) provides:

> **§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay**
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Petitioners' lengthy statement of the case contains numerous misstatements of fact, inaccurate characterizations of the opinions of the courts below and plain argument. The facts of the case are concisely stated in the decisions of the courts below, and Respondents incorporate by reference the facts as stated therein. (Pet'r App. at A-1 - A-17; B-1 - B-20.) In addition, however, pursuant to Supreme Court Rule 15.2, Respondents are obligated to point out certain specific misstatements in the petition.

Petitioners were not "duped" by Respondents' alleged post-sale predicate acts into believing their Harvestore silo functioned as represented or was the "cadillac" of silos. (*Contra* Pet. at 6.) Petitioners were aware as early as 1976 that they were encountering problems directly contrary to Respondents' representations concerning the benefits of the silo, and that the silo was not performing as represented. (Pet'r App. at A-2 - A-9.)

No predicate acts occurred within four years of commencement of the lawsuit which made any new or different claims than the pre-1989 predicate acts described in the Petitioners' Amended Complaint. (*Contra* Pet. at 6.) The alleged predicate acts occurring after August 27, 1989 contain the same general representations contained in the 50 or more previous predicate acts alleged in the Amended Complaint, all of which occurred more than four years before commencement of this lawsuit. (Pet'r App. at G-2 - G-25.)

Petitioners did in fact see mold in the feed that was fed to their livestock, and were able to see mold coming out of the silo with the naked eye. (*Contra* Pet. at 7.) Petitioners admitted that they observed mold in their feed every year from 1976 through 1991, and they knew that mold and spoilage in feed was caused by exposure to oxygen and was harmful to their dairy cattle. (Pet'r App. at. A-2 - A-6.)

The court below specifically addressed Petitioners' argument that continuing predicate acts within four years of commencement of the lawsuit proximately caused their alleged "continuing new damages." (*Contra* Pet. at 9.) The Eighth Circuit rejected Petitioners' argument to "adopt a 'separate accrual rule,' which would permit them to recover damages for predicate acts that occur within the limitations period, even if their claim for similar damages caused by similar predicate acts outside of the four-year period are time-barred." (Pet'r App. at A-16) The court reasoned that such an "open-ended" standard was inconsistent with the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff. (*Id.*)

The court below also considered Petitioners' argument that Respondents prevented Petitioners from discovering internal research contradicting the advertising claims allegedly made by the Respondents. (*Contra* Pet. at 9.) The Eighth Circuit rejected this argument, noting that the limitations period would not wait to run until Petitioners were able to pinpoint a design flaw that prevented the silo from performing as represented. (Pet'r App. at A-11.) The Eighth Circuit further held that Petitioners made no showing that Respondents concealed facts giving rise to the alleged cause of action. (*Id.* at A-12 - A-13.)

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION TO CONSIDER THE PETITION FOR WRIT OF CERTIORARI BECAUSE A PETITION FOR REHEARING WAS NOT TIMELY FILED IN THE COURT OF APPEALS, AND THE PETITION FOR WRIT OF CERTIORARI WAS FILED 141 DAYS AFTER JUDGMENT WAS ENTERED BELOW.

This Court lacks jurisdiction to entertain the petition for writ of certiorari because Petitioners' petition for rehearing was not timely filed in the Eighth Circuit, and the petition for writ of certiorari was filed 141 days after judgment was entered below.

A petition for writ of certiorari must be filed within ninety days after the entry of judgment in the court of appeals. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. This 90-day time limit is "mandatory and jurisdictional." *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994) (citing *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). This Court has "no authority to extend the period for filing except as Congress permits." *Jenkins*, 495 U.S. at 45. Unless a petition for writ of certiorari is filed within ninety days after the entry of judgment in the court of appeals, this Court "must dismiss the petition." *Id.*

While a "timely" petition for rehearing presented to the court of appeals may toll the start of the 90-day period in which a petition for writ of certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing, such a petition for rehearing must be "timely" filed to extend the filing period for certiorari. *Jenkins*, 495 U.S. at 45-46; Sup. Ct. R. 13.3. Supreme Court Rule 13.3 states:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But *if a petition for rehearing is timely filed* in a lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to the United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

Sup. Ct. R. 13.3 (emphasis added).

The timeliness of a petition for rehearing in the court of appeals is governed by Rule 40(a) of the Federal Rules of Appellate Procedure, which states that a "petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a). The method by which a petition for rehearing may be "filed" is prescribed by Rule 25(a), which states in relevant part: "[F]iling is not timely unless the clerk *receives* the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing. ..." Fed. R. App. P. 25(a) (emphasis added). Under this Rule, a petition for rehearing, being neither a brief nor an appendix, is not deemed filed until it is *received* by the clerk of court; simply placing the papers in the mail is legally insufficient. *Id.*

In this case, the petition for rehearing was untimely because it was not received, and therefore was not filed, within 14 days after entry of judgment. Judgment was entered below on June 6, 1996 when the Eighth Circuit issued its opinion. (Resp't App. at A-9.) Petitioners had 14 days thereafter, or until June 20, 1996,

to file their petition for rehearing. It is undisputed that the petition for rehearing was "received untimely" on June 21, 1996, more than fourteen days after entry of judgment. (*Id.*) Since it was not received by the clerk within fourteen days after entry of judgment, it was not timely filed under Rule 25(a). The "untimely petition" was denied by the Eighth Circuit on July 29, 1996. (*Id.*)

Because the petition for rehearing was not timely filed within 14 days after entry of judgment and the time for filing was not enlarged by order or local rule, the 90-day period for filing the petition for writ of certiorari began to run when judgment was entered on June 6, 1996, not on July 29, 1996 when the untimely petition for rehearing was denied. *See* Sup. Ct. R. 13.3. Accordingly, the time within which to file this petition expired on September 4, 1996. This petition was filed 51 days after the time period prescribed by Congress and the Rules of this Court.

Although the Eighth Circuit's order denying the petition for rehearing does not state, on its face, that the petition was denied because it was untimely, its failure to so note does not somehow render the clearly untimely petition timely. The General Docket makes clear that the Eighth Circuit determined the petition to be untimely: it notes that the court "*received untimely petition* for rehearing" on June 21, 1996, and describes the court's July 29, 1996 order as "denying *untimely petition* for panel rehearing." (Resp't App. at A-9 (emphasis added).) Moreover, since the petition for rehearing was not timely filed within fourteen days after entry of judgment, no subsequent order of the court of appeals can extend the time for filing a petition for writ of certiorari. *See Jenkins*, 495 U.S. at 45 (stating that "we have no authority to extend the period for filing [a petition for certiorari] except as Congress permits"); *Allegrucci v. United States*, 372 U.S. 954 (1963) (denying certiorari "for the reason that the petition was not timely filed," despite action of court of appeals in entertaining out-of-time petition for rehearing and in denying that petition for rehearing "after due consideration"); *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S.

206, 211-13 (1952) (stating that time to seek rehearing or review of judgment cannot be enlarged by lower court in its discretion and explaining that statutes limiting Supreme Court's jurisdiction to cases where review is sought within prescribed time period do not permit tolling of time limitations because of events in lower court which do not affect substance of judgment to be considered on review); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (holding that petition for certiorari filed outside prescribed filing period following entry of judgment in lower court "must ... be denied for want of jurisdiction," despite lower court's order subsequent to entry of judgment and within the prescribed filing period purporting to amend final order) (per curiam); *Chin Gum v. United States*, 150 F.2d 765, 766 (1st Cir. 1945) (explaining that denial of petition for rehearing filed out of time by leave of court "did not operate to revive the already expired jurisdiction of the supreme court to entertain a petition for certiorari") (per curiam); Stern, et al., *Supreme Court Practice* 279 (7th ed. 1993).[1]

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[1] From previous communications with Petitioners' counsel, Respondents anticipate that Petitioners may argue in reply that the court of appeals effectively extended the time for filing their petition by accepting their untimely petition for rehearing, considering it on the merits, and then denying it. This argument is factually *and* legally incorrect. The Eighth Circuit did not dispose of Petitioners' untimely petition for rehearing on the merits. Rather, the court's order states that "[t]he petition for rehearing filed by the appellants' [sic] has been considered by the court and is denied." (Pet'r App. at C-1.) The Eighth Circuit's General Docket sheet explains that, upon consideration, the court found the petition to be "untimely," and accordingly, it was denied. (Resp't App. at A-9.) The Eighth Circuit "considered" the petition only to determine whether it was timely and did not reach its merits. Therefore, the 90-day time limit was not tolled. See *Pfister v. Northern Illinois Fin. Corp.*, 317 U.S. 144, 150 (1942).

(continued . . .)

The petition for rehearing below was not timely filed. Accordingly, the Court should dismiss the petition for writ of certiorari for lack of jurisdiction.

II. THE OPINION OF THE COURT OF APPEALS IS CORRECT AS A MATTER OF LAW, AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The Eighth Circuit affirmed the dismissal of Petitioners' civil RICO claims, correctly concluding that the claims were time-barred based on the damaging admissions made by the Petitioners in their sworn deposition testimony and pleadings below. Employing an "injury plus pattern" discovery accrual rule, the Eighth Circuit correctly determined, based on the specific facts of this case, that Petitioners knew, or through the exercise of reasonable diligence should have known, of their injuries, the source of their injuries and that their injuries were part of a pattern of suspected racketeering activity "long before" August 27, 1989, four years before the commencement of their lawsuit. (Pet'r App. at A-15 - A-17.) The Eighth Circuit also correctly determined, based on conceded facts, that the Petitioners should have discovered their injury, its source and the predicate acts which formed the "pattern" *simultaneously*, soon after they began using their silo in 1975. (*Id.* at A-15.) The predicate acts described in the Amended Complaint which occurred within the four year limitations period were correctly found by the court to be part of the same pattern which Petitioners should have discovered soon after they purchased the silo, and the "continuing damage" occurring within the four-year limitations period was found to be qualitatively indistinguishable from the "single, continuous injury" sustained over the previous fifteen years. (*Id.* at A-16 - A-17.)

The Eighth Circuit's conclusions described above are overwhelmingly supported by the uncontroverted facts in the record and are not challenged in this petition. Based on these undisputed facts, no court of appeals would have reached an outcome different than the one reached by the Eighth Circuit here. Whatever theoretical distinctions may exist between the discovery accrual standards articulated by the various circuits, their application to the unique facts in this case dictate a uniform result. This case presents no opportunity for this Court to pronounce anything more than what is already clearly established: once a plaintiff discovers his injury, its source and a pattern of racketeering, he has four years to bring a civil RICO action; claims for identical injuries resulting from the same previously-discovered pattern of activity are not separately actionable under civil RICO.

(. . . continued)

Petitioners' anticipated argument also fails legally because the court of appeals cannot extend the 90-day jurisdictional limit established by Congress by "considering" an untimely petition for rehearing. *Pink*, 317 U.S. at 268. Petitioners apparently are confusing the strict jurisdictional limits imposed by Congress on this Court's power to entertain petitions for writ of certiorari with the unqualified discretion once vested in the district courts, sitting as courts of equity, to accept untimely petitions to review the administrative decisions of bankruptcy referees. *See Pfister*, 317 U.S. at 152-53 (holding that a bankruptcy court has the power to permit untimely petition for rehearing of bankruptcy referee's order where the statute prescribing the time for filing petitions was "not ... intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period," since Congress had "unqualifiedly given" bankruptcy court power to review referee's order); *Bowman v. Loperena*, 311 U.S. 262 (1940) (same). These cases stand in sharp contrast to the "mandatory and jurisdictional" time limits imposed by Congress for filing a petition for writ of certiorari to this Court. *See NRA Political Victory Fund*, 115 S. Ct. at 539; *Jenkins*, 495 U.S. at 45.

A. The Courts of Appeals are Not in Conflict Regarding the Date of Accrual of a Civil RICO Claim, Where the Plaintiff Simultaneously Discovers His Injury, its Source and the Predicate Acts Forming the Pattern of Racketeering Activity More Than Four Years Before Commencement of the Lawsuit.

Under the Eighth Circuit's "injury plus pattern" discovery accrual rule, a civil RICO cause of action accrues "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." (Pet'r App. at A-14.) The Eighth Circuit standard is identical to the discovery accrual rule adopted by the Sixth, Tenth and Eleventh Circuits. *See Caproni v. Prudential Sec., Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820-21 & n.2 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Applying this standard to the facts in this case, the Eighth Circuit held (and Petitioners here do not challenge) that the Petitioners should have known some time in the 1970s that the Respondents' representations concerning the Harvestore silo were not true, and therefore should have recognized the existence and source of their injury. Similarly, because Petitioners had received dozens of promotional advertisements in the mail both before and after purchasing the silo, the court found they should have known that the allegedly fraudulent advertising constituted a pattern at the same time they should have identified the Harvestore as the cause and source of their problems. (Pet'r App. at A-15; *accord Agristor Fin. Corp. v. VanSickle*, 967 F.2d 233, 241-42 (6th Cir. 1992) (holding in a virtually identical RICO case against Respondents that "as a matter of law, [the plaintiff] should have determined that the representations were part of a pattern at the same time it should have discovered that the silos caused the

alleged problems on the dairy farm"); *Bath*, 913 F.2d at 821 n.2 (stating that merely because "a plaintiff can identify one predicate act that occurred within four years of the filing of the complaint" does not render irrelevant "the question of when the plaintiff discovered, or should have discovered that his injury was part of a pattern of racketeering activity"); *Bivens*, 906 F.2d at 1554-55 (rejecting argument that because plaintiff could identify one or more predicate acts occurring within four years of filing the complaint, their civil RICO claim did not accrue; the appropriate question is "when each plaintiff knew or should have known that his injuries were part of a pattern")).

Petitioners' claim would fare no better under the "injury discovery" accrual rule. Under this standard, the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action. *See, e.g., Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990) (Breyer, C.J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211, 220 (4th Cir. 1987); *McCool v Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992). Under the "injury discovery" accrual rule, Petitioners' claims clearly would be time-barred. As noted by the court below, Petitioners were aware of their injury and its source sometime in the 1970s, fifteen or more years before this lawsuit was commenced; Petitioners do not challenge that conclusion here.

Furthermore, while courts employing both "injury plus pattern" and "injury discovery" accrual rules have recognized that separate injuries may give rise to separate causes of action under RICO, this so-called "separate accrual" rule applies only to "new and independent" injuries; injuries which are qualitatively indistinguishable from previous injuries or which are merely a continuation of injuries naturally flowing from the same pattern of racketeering activity are not separately actionable and do not

recommence the civil RICO limitations period. *See Grimmett*, 75 F.3d at 513-514; *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995); *McCool*, 972 F.2d at 1465 n.10; *Glessner v. Kenny*, 952 F.2 702, 708 (3d Cir. 1991); *Bivens Gardens Office Bldg.*, 906 F.2d at 1549-51; *Bankers Trust*, 859 F.2d at 1102-05.[2]

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[2] For example, in *Grimmett, 75 F.3d at 513-4*, the Ninth Circuit found, as a matter of law, that the following events, all of which occurred within the four-year limitations period, were part of same fraudulent scheme to deprive plaintiff of her interest in defendant's medical practice, and did not constitute "new and independent" acts or injuries giving rise to a separate RICO limitations period: (1) mail fraud by submitting false documents to the bankruptcy court; (2) obstruction of justice by concealing documents and giving false deposition testimony; (3) defrauding a business partner in furtherance of the scheme; and (4) defrauding owners of a partnership by failing to disclose their full liability to plaintiff. Similarly, in *Glessner, 952 F.2d at 708*, the Third Circuit held that the cost of replacing a defective furnace did not constitute an independent injury separate and apart from the damage associated with excessive servicing and repairs so as to revive plaintiff's RICO cause of action. The court noted that "the mere continuation of damages into a later period will not serve to extend the statute of limitations." (*Id.*). In *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), the Second Circuit, discussing its earlier decision in *LILCO v. Imo Indus., Inc.*, 6 F.3d 876 (2nd Cir. 1993), noted that a plaintiff's civil RICO cause of action accrues upon discovery that a product is defective in derogation of contract and warranty rights; any additional financial losses resulting from the plaintiff's decision in that case to use and repair the defective product were not independent from the original injuries so as to recommence the RICO limitations period. (*Id.*) Cf. *Bivens Gardens Office Bldg.*, 906 F.2d at 1549-51 (independent injuries arose from defendant's wrongful takeover of hotel in 1975, diversion of assets in 1981 and wrongful sale of hotel in 1981; later injuries were "not included among the injuries that naturally flow" from wrongful takeover in 1975); *Bankers Trust*, 859 F.2d at 1102-05 (wrongful concealment of assets in bankruptcy proceeding, harassing lawsuits to prevent plaintiff from vacating fraudulently attained bankruptcy plan and later fraudulent conveyance of property held to be "independent" injuries subject to separate accrual.)

Consistent with precedent from other circuits, the Eighth Circuit correctly determined that the injuries alleged by Petitioners within the limitations period were identical to the injuries allegedly suffered over the preceding fifteen years, and were merely part of "one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989." (Pet'r App. A-16 - A-17.) In the absence of "new and independent" injuries within the limitations period (which Petitioners do not assert), no court of appeals would have reached a conclusion different than the decision below.

Even under the so called "last predicate act" accrual rule employed by the Third Circuit, which Petitioners urge this Court to adopt, Petitioners' claim would be time-barred. The last predicate act rule was first articulated in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), in response to a concern that the injury discovery accrual rule produced inequitable results "where a plaintiff may be injured by a single predicate act which is not followed by the other predicate act or acts necessary to create a 'pattern of racketeering activity' until some later time. ..." *Id.* at 1129. The Third Circuit therefore held that a civil RICO claim accrues when the plaintiff knew or should have known that the elements of a RICO claim existed unless, as part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the claim accrues upon discovery of the last injury or last predicate act that is part of the same pattern of activity. *Id.* at 1130. Since *Keystone*, the last predicate act rule has been roundly criticized by other courts as too "open-ended," prone to producing absurd and indefensible results and inconsistent with the principles of due diligence underlying the statute of limitations. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Rodriguez*, 917 F.2d at 666-67; *Bath*, 913 F.2d at 821 n.2; *Bivens*, 906 F.2d at 1554.

In subsequent decisions, the Third Circuit has considerably narrowed its holding in *Keystone*. In *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991), the court noted that a civil RICO plaintiff's limitations period "must be measured from the time it knew or should have known of the *pattern of racketeering activity*." *Id.* at 706 (emphasis added). More recently, in *Davis v. Grusemeyer*, 996 F.2d 617 (3d Cir. 1993), the court specifically rejected the argument that knowledge of a pattern was insufficient to commence the limitations period unless the plaintiff knew of all the predicate acts that encompassed the pattern of racketeering activity: "[T]he question is not when [the plaintiff] knew each and every predicate act charged in the complaint, but when he knew or, with reasonable diligence, should have known that defendants' [predicate act] was *part of a developed pattern of racketeering*." *Id.* at 625 n.16 (emphasis added). Here, as noted by the Eighth Circuit, the Petitioners should have known that the allegedly fraudulent advertising constituted a pattern of racketeering activity sometime in the 1970s, having received more than 50 allegedly fraudulent advertisements in the mail before and after the purchase. (Pet'r App. at A-15.) Because the events giving rise to the Petitioners' discovery of the injuries, their source and the predicate acts forming the pattern of racketeering all occurred simultaneously, their claims would be time-barred even under the accrual rule employed in the Third Circuit. *See Davis*, 996 F.2d at 625 n.16; *Keystone*, 863 F.2d at 1130 (explaining that, in situations where all injuries and predicate acts which form the pattern occur simultaneously, the last predicate act rule and the injury discovery rule achieve the same result).

B. The *Grimmett* Case Will Not Affect the Outcome of this Action.

There is no reason to delay the denial of this petition for writ of certiorari pending this Court's decision in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996). In

Grimmett, the Ninth Circuit affirmed dismissal of the plaintiff's RICO claims under the "injury discovery" accrual rule, holding that the plaintiff's cause of action under RICO arose when she knew or should have known that she had been injured. *Id.* at 512. *Grimmett* does not present the legal question presented here--namely, whether a plaintiff who has *already discovered* the existence and source of his injuries and that the injuries were caused by a pattern of racketeering activity more than four years before filing suit may nonetheless sue for identical injuries within the limitations period flowing from precisely the same pattern of conduct. Rather, the issue in *Grimmett* is merely whether the Ninth Circuit should have employed the same "injury plus pattern" discovery accrual rule *applied by the Eighth Circuit in this case*. *Id.* at 509, 511. The petition for writ of certiorari in *Grimmett* accepted by this Court frames the question presented as follows:

> Whether a civil RICO cause of action accrues when the plaintiff knows or should have known she has been injured -- even though she does not know that her injury was caused *by the defendants* -- or only where she knows or should know that her injury was caused by the defendants and is part of a pattern of racketeering activity.

Grimmett v. Brown, No. 95-1723 (U.S.) (Pet. for Writ of Cert. at *i*). Because the Eighth Circuit applied the more liberal "injury plus pattern" discovery rule in dismissing Petitioners' claims below, this Court's resolution of *Grimmett* will have no effect on the Eighth Circuit's disposition of this case.

Furthermore, in their argument to the Ninth Circuit, the petitioners in *Grimmett* scrupulously avoided arguing for the adoption of the standard urged by Petitioners here--i.e., the last predicate act rule or some variation thereof. *See Grimmett*, 75 F.3d at 511 n.4 (stating that "[plaintiff] does not argue that the panel should adopt the 'last predicate act' rule."). Nor have the

petitioners in *Grimmett* urged such a standard in their submissions to this Court. Ironically, in their brief to this Court, the petitioners in *Grimmett* have cited, *with approval*, the Eighth Circuit's opinion in this case as promoting a rule that "ensures against the lazy plaintiff" by requiring a plaintiff to use due diligence to discover the pattern element of his RICO claim. *Grimmett v. Brown*, No. 95-1723, 1996 WL 469157, at *48 n.23 (U.S.) (Brf. for Pet'r).[3]

Because this Court's decision in *Grimmett* will not affect the outcome reached by the Eighth Circuit below, there is no reason for this Court to delay the denial of the petition for writ of certiorari in this case.

C. The Eighth Circuit's Application of the Equitable Tolling Doctrine Is Not in Conflict with Decisions in Other Circuits.

For well over a century, the doctrine of equitable tolling has consistently been defined by this Court to *require* a plaintiff injured by fraud to exercise due diligence to avoid the bar of the statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Wood v. Carpenter*, 101 U.S. 135, 143 (1879); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 348 (1875). Contrary to this unbroken line of authority, Petitioners here ask this Court to adopt a rule that would reward them for their admitted failure to exercise reasonable diligence in bringing this action, despite having knowledge of their injury, its source and the existence of

[3] The Court's decision of *Grimmett* likewise will have no impact on the "equitable tolling" issues raised by Petitioners in this case. (Pet. at 13.) The Ninth Circuit rejected plaintiff's equitable tolling argument in *Grimmett*, noting that the tolling defense had been waived because the plaintiff never pled the allegedly concealed facts. *Grimmett*, 75 F.3d at 514. In their petition to this Court, petitioners in *Grimmett* concede they "do not seek review of [the equitable tolling] issue because it is fact-bound." *Grimmett v. Brown*, No. 95-1723 (U.S.) (Pet. for Writ of Cert. at 7).

their cause of action. Allowing the petitioners to bring suit more than a decade after they became aware of the facts underlying their claims is antithetical to the salutary purpose of statutes of limitations. "Statutes of limitations ... represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

There is no conflict among the circuits as to whether a plaintiff should be excused for failure to exercise reasonable diligence where there has been no concealment of the facts putting the plaintiff on notice of the existence of his cause of action. *See e.g., Grimmett*, 75 F.3d at 514 (the "doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant *actively* misled her, and that she had neither actual nor constructive knowledge of the *facts constituting her cause of action* despite her due diligence") (emphasis in original); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (fraudulent concealment applies only if there is concealment of facts that are the basis of plaintiff's claim and the plaintiff exercises due diligence); *Davis*, 996 F.2d at 624 n.13 (fraudulent concealment may toll the statute of limitations only if the very existence of the cause of action is concealed, and ignorance of the claim is not attributable to plaintiff's lack of diligence). *Accord J. Geils Band Ben. Plan v. Smith Barney, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328 (8th Cir. 1996); *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984).

The asserted conflict among the circuits regarding the need for a plaintiff to exercise reasonable diligence to invoke equitable tolling is superficial at best. To the extent *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2nd Cir. 1979) and

Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975) can be read to excuse a plaintiff from the requirement of exercising due diligence, those cases concerned facts where the concealment was "so effective that there was no reason for a diligent plaintiff to have entered into any inquiries as to a possible cause of action." *Hohri v. United States*, 782 F.2d 227, 248 n.54 (D.C. Cir. 1986). Thus, it has been generally recognized that the so-called split among the circuits "may be more apparent than real." *Id.; Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (stating that the circuits' split may be "apparent rather than real"); *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (circuits' split is "more illusory than real" since the fraudulent concealment in *Sperry* and *Robertson* cases were "such that even reasonably diligent plaintiffs would not have been put on notice"); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 695 n.16 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) ("[T]he view that there are two distinct doctrines of tolling perhaps derives from a confusion with earlier versions of the equitable rule requiring plaintiff to prove actual diligence. Such proof was excused if defendant had concealed all cause of reasonable suspicion").

Here, the Eighth Circuit ruled that equitable tolling did not save the Petitioners' claim from the bar of the statute of limitations because Petitioners failed to act with due diligence *despite having knowledge of the facts constituting their cause of action.* (Pet'r App. at A-15 - A-17). The ruling below is consistent with precedent from this Court and other courts of appeals.

In addition, the Eighth Circuit correctly found that Petitioners made no showing that the Respondents affirmatively concealed the existence of the facts establishing the Petitioners' cause of action, and therefore concluded that fraudulent concealment was inapplicable. (*Id.* at A-13, A-15). As correctly noted by the court below, the Respondents did not, and *could*

not, prevent the Petitioners from discovering the facts giving rise to their cause of action since the evidence was in the Petitioners' own back yard: Petitioners were aware, directly contrary to the pattern of advertising representations disseminated by the Respondents, that there was mold in their feed, that the health of their dairy animals was failing and that their milk production was poor. (*Id.* at A-13). Although the petition makes no mention of the fact that the court of appeals specifically found that Respondents had done nothing to affirmatively conceal the existence of Petitioners' cause of action, the absence of fraudulent concealment provides a separate basis for the court's conclusion that equitable tolling did not extend the limitations period.

As a creature of equity, the doctrine of equitable tolling necessarily depends upon the unique facts of each case. Based on the particular facts of this case, both courts below correctly determined that equitable relief from the statute of limitations was unwarranted, given the Petitioners' knowledge of the existence of their injury and their cause of action, and their failure to act with diligence despite this knowledge. This issue is inherently fact-bound, and provides no opportunity for this Court to provide guidance to courts or practitioners beyond this case.

CONCLUSION

This Court lacks jurisdiction to entertain the petition for writ of certiorari because the petition for rehearing was not timely filed in the court of appeals, and this petition for writ of certiorari was filed more than ninety days after judgment was entered below. In the alternative, the petition should be denied because none of the considerations warranting certiorari has been met. The petition is without merit and should be denied.

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GENERAL DOCKET FOR
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 95-1355 Filed: 2/10/95
Marvin Klehr, et al v. A.O. Smith Corp., et al
civil - private - none
Appeal from: U.S. DISTRICT COURT, MINNESOTA

Lower court information:

District: 0864-3 : CIV 3-94-424
Trial Judge: Michael J. Davis, U.S. District Judge
Court Reporter: Karen Grufman, Court Reporter
Date Filed: 8/27/93
Date order/judgment: 1/6/95
Date NOA filed: 2/2/95

Fee status: paid

Prior cases:
None
Current cases:
None

A true copy,

ATTEST: s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

10/30/96

Docket as of October 30, 1996 2:39 pm Page 1

Proceedings include all events.
95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

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v.

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[COR LD NTC ret]

MVBA HARVESTORE SYSTEMS
Movant

Caption

MARVIN KLEHR; MARY KLEHR;

Plaintiffs - Appellants

WILLIAM G. OLSON

Intervenor

v.

A.O. SMITH CORPORATION;
A.O. SMITH HARVESTORE PRODUCTS,
INC., Jointly and Severally

Defendants - Appellees

MVBA HARVESTORE SYSTEMS

Movant

Proceedings include all events.
95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

2/10/95 Civil Case Docketed. (jmb)

2/10/95 CERTIFIED copies notice of appeal, docket entries, order and judgment of 1/6/95. [95-1355] [536436] (jmb)

2/10/95 BRIEFING SCHEDULE: [95-1355] Method of apndx due on 2/21/95 DR aplnt due on 2/21/95 DR aplee due on 3/2/95 Transcript due on 3/22/95 Apndx due on 4/3/95 Aplnt brief due on 4/3/95 Aplee brief due on 5/3/95 reply brief due on 5/17/95 (jmb)

2/13/95 REMARKS: Transcript Ordered. [95-1355] (yml)

2/16/95 APPEARANCE for appellee, attorney Frederick W. Morris [95-1355] [539100] (sek)

2/16/95 APPEARANCE for appellee, attorney Blake Shepard [95-1355] [539101] (sek)

2/17/95 APPEARANCE for appellant, attorney Charles A. Bird [95-1355] [540145] (sek)

2/17/95 APPEARANCE for appellee, attorney David K. Schmitt [95-1355] [540146] (sek)

2/22/95 RECORDS received: Transcript, consisting of one motion summary jdgmt Volume. Location St. Paul. [95-1355] (mgj)

3/30/95 RECORDS received: Appendix filed by Appellants Marvin Klehr consisting of 4 Volume(s), 3 Copies. [95-1355] (yml)

4/3/95 BRIEF FILED - Brief of the Appellants - Marvin Klehr, Mary Klehr. 50 pgs - w/addendum - 10 copies - w/service 3/31/95 [95-1355] [554728] (yml)

4/17/95 MOTION of aplees, for extension of time to file brief until 5/10/95 . [95-1355] [560897] w/service 4/13/95 (skh)

4/18/95 ORDER filed:granting appellee motion extension of time to file brief [560897-1] [560916] Aplee brief now due on 5/10/95 . (skh)

4/25/95 MOTION of aplnt, Marvin Klehr, Mary Klehr, for extension of time to file reply brief until 5/24/95 . [95-1355] [564919], - NO ACTION TAKEN. Date already extended with granting of appellee's motion for ext. w/service 4/24/95 (skh)

5/11/95 RECORDS received: Appendix filed by Appellees A.O. Smith Corp., Appellees A.O. Smith consisting of 1 Volume(s), 3 Copies. [95-1355] (yml)

Proceedings include all events.
95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

5/11/95 BRIEF FILED - Brief of Appellee - A.O. Smith Corp., A.O. Smith. 47 pgs - - 10 copies - w/service 5/10/95 . Defects [95-1355] [572480] (yml)

5/19/95 TO SCREENING - to St. Paul. [95-1355] (mel)

5/30/95 BRIEF FILED - Reply brief - Marvin Klehr, Mary Klehr . 25 pgs - 10 copies - w/service 5/26/95 . [95-1355] [576990] (yml)

6/13/95 RETURNED from Screening (20) [95-1355] (mel)

8/24/95 *SET FOR ARGUMENT* - October in St. Paul. [95-1355] (dgh)

10/18/95 APPEARANCE for appellant, attorney James Anthony Vick [95-1355] [629794] (rla)

10/18/95 ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES George G. Fagg, Circuit Judge, Gerald W. Heaney, Circuit Judge, David R. Hansen, Circuit Judge. James Anthony Vick for Appellants Mary Klehr. Blake Shepard for Appellees A.O. Smith, by: James Vick. RECORDED. [95-1355] (rla)

11/13/95 28(j) citation received and filed from Appellants Marvin Klehr TO COURT. [95-1355] [640916] (rla)

11/15/95 RESPONSE of aplee, A.O. Smith Corp., A.O. Smith, in opposition to 28(j) citation TO COURT. filed by Marvin Klehr [640916-1] . (rla)

6/6/96 THE COURT: George G. Fagg, Gerald W. Heaney, David R. Hansen. OPINION FILED by David R. Hansen; PUBLISHED. [95-1355] [718195] (mjh)

6/6/96 JUDGMENT: George G. Fagg, Gerald W. Heaney, David R. Hansen
The judgment of the lower court is AFFIRMED in accordance with the opinion. [95-1355] [718198] (mjh)

6/21/96 RECEIVED UNTIMELY Petition for rehearing by the panel, filed by Appellants Marvin Klehr, Appellants Mary Klehr w/service 6/20/96, TO COURT. [95-1355] (mam)

7/29/96 JUDGE ORDER: denying untimely petition for panel rehearing [724943-1] filed by Marvin Klehr, Mary Klehr [95-1355] [738002] (mam)

8/9/96 MANDATE ISSUED [95-1355] (mam)

8/15/96 RECEIPT for Mandate. [95-1355] [745615] (mam)